Filed 7/12/17 P. v. Ratcliffe CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTOINE DION RATCLIFFE, Defendant and Appellant.	E063690 (Super.Ct.No. RIF1103874) OPINION

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge. Affirmed with directions.

Diane Nichols, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Charles C. Ragland, Scott C. Taylor and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant and appellant Antoine Dion Ratcliffe was convicted of premeditated murder (Pen. Code,[1] § 187, subd. (a); count 1), assault with a firearm (§ 245, subd. (a)(2); count 2), four counts of attempted premeditated murder (§§ 664, 187, subd. (a); counts 3, 4, 5, 6), malicious discharge of a firearm into an occupied dwelling (§ 246; count 7), and felon in possession of a firearm (former § 12021, subd. (a)(1); count 8). It was further found true that defendant personally and intentionally discharged a firearm causing great bodily injury or death to another person who was not an accomplice (§ 12022.53, subd. (d)); that he personally and intentionally discharged a firearm (§ 12022.53, subd. (c); counts 3, 4, 5, 6); and that he committed the crimes for the benefit of a criminal street gang (§§ 186.22, subd. (b), 190.2(a)(22)). Defendant admitted that he suffered a prior serious felony conviction (§ 667, subd. (a)) and a prior strike conviction (§§ 667, subds. (c) and (e)(1); 1170.12, subd. (c)(1)). The trial court imposed a sentence of life without the possibility of parole (count 1), a determinate sentence of 96 years, plus an indeterminate sentence of 145 years to life.

Defendant appeals, contending: (1) the trial court prejudicially erred when it denied his motion to suppress his statement to detectives on July 20, 2011, because they were obtained through deception, manipulation and promises of leniency; (2) the jury was improperly instructed on the "kill zone" theory pursuant to CALCRIM No. 600;

[1] All further statutory references are to the Penal Code.

(3) the prosecutor committed misconduct[2] during closing argument by misstating the legal standard to be applied in deciding whether provocation was legally sufficient to constitute heat of passion attempted voluntary manslaughter; (4) the trial court erred in instructing the jury on consciousness of guilt based on false statements using CALCRIM No. 362; (5) the cumulative error doctrine applies; and (6) the abstract of judgment must be modified by deleting the parole revocation fine. We will order the abstract of judgment modified. Otherwise, we affirm.

I. FACTS

After midnight on Saturday, June 11, 2011, a 17-year-old girl (the victim) was shot to death in Moreno Valley. She was in her parked car with a group of girlfriends, talking to a group of boys.[3] Some of the boys were members of Southside Mafia street gang (Southside). Earlier in the evening a male in a silver or gray Impala drove by the group of boys, who were attending a party, and yelled out "Web," indicating he was a member of the Sex Cash gang, the main enemy of Southside. The group of boys responded by yelling "Fuck fags," a verbal disrespect towards a member of the Sex Cash gang. While the boys were talking to the girls, the Impala approached them on the opposite side of the street. One of the boys saw three people in the car, a woman and two Black males. Another boy yelled, "Fuck fags."

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[2] We will use the term "prosecutorial error" because it is a more apt description than prosecutorial misconduct. (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667.)

[3] G., J., M.1, M.2, and Y.

The Impala stopped about 40 feet from the victim's car, and defendant emerged from the back passenger side seat with a gun. He pointed it in the direction of all of the girls and the group of boys, and started shooting. As the victim was pulling away from the curb, defendant ran beside her car and fired at the driver's window, shattering it and killing her.

An investigation of the shooting led Riverside County Sheriff's Department to defendant. Defendant was interviewed on June 12, July 8, and July 20, 2011.

II. DISCUSSION

A. The Trial Court Properly Denied Defendant's Motion to Suppress.

Defendant contends the trial court prejudicially erred when it denied his motion to suppress his statement to detectives on July 20, 2011. He claims that his statements, made after waiving his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), were obtained through deception, manipulation and promises of leniency. We disagree.

1. Further Background Facts.

On February 6, 2015, defendant filed a motion to suppress all of his audio recorded statements that he made during his interview on July 20, 2011, with Detectives Ronald Waters and James Campos at Chino State Prison.[4] Defendant stated that he was

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[4] Defendant focuses on the following exchange that occurred prior to the advisement of his *Miranda* rights:

"INVESTIGATOR WATERS: . . . Antoine; right, partner?

"[DEFENDANT]: Hi, how are you doing?

"INVESTIGATOR WATERS: Good. Good, how are you, man?

"[DEFENDANT]: I'm all right. [¶] . . . [¶]

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"INVESTIGATOR WATERS: Hey, I'm Investigator Waters, all right, and I'm with the sheriff's department—the homicide unit. [¶] . . . [¶] And my partner here—here he comes. . . . This is James Campos, all right.

"[DEFENDANT]: Un-huh.

"INVESTIGATOR WATERS: Hey, I know you already talked to Colmer—Lance Colmer. I'm—I'm the one that's working on the—that shooting out there in Moreno Valley— [¶] . . . [¶] —last month, I think, on the 9th or something like that.

"[DEFENDANT]: Yeah, I believe it was June 12th.

"INVESTIGATOR WATERS: Okay. Yeah. [¶] . . . [¶] Time is slipping away already. I'm the one . . . doing that investigation, all right. Colmer's been helping me, because he works for Moreno Valley out of that station, and, you know, I—I hop around from station to station, man— [¶] . . . [¶] —throughout the whole—this afternoon, I could be in, fricking, Blythe out in the desert, all right. [¶] . . . [¶] It's just the way it goes, but I want to take this—he told me that, you know, he violated you. He said— [¶] . . . [¶] —you know, so my point was, I actually wanted to talk to you myself before, you know, we were under these circumstances or anything. [¶] . . . [¶] All right?

"[DEFENDANT]: Uh-huh.

"INVESTIGATOR WATERS: But just I got busy and shit, and you know, shit happens but— [¶] . . . [¶] —I want to talk to you about it, you know. Some things have come up, you know. It's been over a month now. [¶] . . . [¶] But we're kind of, at the end of that, you know—kind of, at the end of my investigation right now.

"[DEFENDANT]: Uh-huh.

"INVESTIGATOR WATERS: All right. And I know there—there's some issues that I need to deal directly with you about. [¶] . . . [¶] And I want to be able to afford you that opportunity to—to talk to me, so we can set things straight, you know.

"[DEFENDANT]: Okay.

"INVESTIGATOR WATERS: I'm not here to bull shit you.

"[DEFENDANT]: Uh-huh.

"INVESTIGATOR WATERS: He's not, and—and I know you've been around a little bit, all right. And I'm going to expect the same from you. [¶] . . . [¶] All right. And everything's straight up. [¶] . . . [¶] What we talk about stays right here.

"[DEFENDANT]: Uh-huh.

"INVESTIGATOR WATERS: All right. I've been doing this job for over 23 years, man, and I know, you know, the first thing that's going to burn somebody is loose lips. [¶] . . . [¶] All right. So I tell you, you know, what—what's said here stays here. I'm not going to tell you what anybody else told me or—or who I've talked to or anything.

"[DEFENDANT]: Uh-huh.

"INVESTIGATOR WATERS: I may give you bits and pieces. [¶] . . . [¶] But you ain't going to know who it's coming from or anything. [¶] . . . [¶] All right. You

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in the prison because of a parole violation for gang affiliation and claimed that his *Miranda* waiver was not knowing and intelligent due to improper inducement, and that his statements were involuntary based on promises of leniency. The prosecution opposed

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got my word on that, all right. So, basically—out—out of respect to you— [¶] . . . [¶] —all right—that's how I operate.

"[DEFENDANT]: Okay.

"INVESTIGATOR WATERS: And I know you can deal with some little, you know, youngster cops and shit, and, you know, things a little bit different. Those guys don't know the routine yet, all right. That's not how we operate.

"[DEFENDANT]: All right.

"INVESTIGATOR WATERS: All right. That's not how we do business.

"[DEFENDANT]: Uh-huh.

"INVESTIGATOR WATERS: All right. But because you are here in custody—you're—you're not under arrest with me or anything. I'm not filing a case on you or anything like that. [¶] . . . [¶] I just—I know you're here because Colmer violated you for some gang shit and—

"[DEFENDANT]: Yeah, and I also have questions too, yeah.

"INVESTIGATOR WATERS: All right.

"[DEFENDANT]: About what are my violation charge?

"INVESTIGATOR WATERS: Okay. The bottom line is I don't—I don't want to talk to you about all that stuff. If there's something I can answer, I'll try to answer. [¶] . . . [¶] All right. But I'm not going to . . . bull shit you along, all right—and give you some fucked-up answer that just—I'm not going to tell you what you want to hear or make some shit up.

"[DEFENDANT]: Uh-huh.

"INVESTIGATOR WATERS: All right. But, Antoine, because you are in custody here, I have to read you your rights, okay.

"[DEFENDANT]: Uh-huh.

"INVESTIGATOR WATERS: And it's just—it's a legal thing.

"[DEFENDANT]: Uh-huh.

"INVESTIGATOR WATERS: Protects you, protects me.

"[DEFENDANT]: Uh-huh.

"INVESTIGATOR WATERS: All right. . . . [Reads defendant his *Miranda* rights.] [¶] . . . [¶]

"INVESTIGATOR WATERS: Okay. Do you want to—do you want to continue talking with me or—

"[DEFENDANT]: I mean, I—I can."

the motion. On April 6, 2015, the trial court stated that it had listened to the audiotape while using the transcript and also read the briefs. After hearing argument from the parties, the court denied the motion, finding defendant was not "tricked" into waiving his *Miranda* rights and that his statements were voluntary because there were no promises of leniency.

2. Standard of Review.

"'A statement is involuntary if it is not the product of "'a rational intellect and free will.'" [Citation.] The test for determining whether a confession is voluntary is whether the defendant's "will was overborne at the time he confessed." [Citation.] "'The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were "such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." [Citation.]' [Citation.] In determining whether or not an accused's will was overborne, 'an examination must be made of "all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." [Citation.]' [Citation.]" [Citation.]'" (*People v. McWhorter* (2009) 47 Cal.4th 318, 346-347.) On appeal, we defer to the trial court's factual findings concerning the circumstances surrounding the interrogation, but we independently review the voluntariness of the defendant's statements under the totality of the circumstances. (*People v. Massie* (1998) 19 Cal.4th 550, 576.)

3. Analysis.

In contending that his statements were not the product of a voluntary waiver of his *Miranda* rights, defendant accuses Detective Waters of "positioning himself as someone who would not have violated [defendant] on parole, minimizing the significance of the interview, presenting the interview as beneficial to [defendant], portraying himself as a candid self-shooter, telling [defendant] twice that their conversation would remain there," and trivializing the advisement as being "'just'" a "'legal thing'" that "'[p]rotects you, protects me.'" Defendant further adds that the detective impliedly promised leniency when he stated that defendant was not under arrest and he (the detective) was not filing any charges against defendant. Rejecting defendant's contentions, we conclude the trial court did not err in denying the motion to suppress and finding a valid waiver of *Miranda* rights.

In *People v. Honeycutt* (1977) 20 Cal.3d 150 (*Honeycutt*), on which defendant relies, the Supreme Court found the officers deliberately plotted "from the inception of the conversation" to induce the defendant to waive his *Miranda* rights, engaging in false ploys that included a "bad cop/good cop" or "Mutt and Jeff routine" and remarks to discredit the victim. (*Honeycutt*, *supra*, at pp. 159, 160, fn. 5.) Specifically, the *Honeycutt* detectives drew the defendant into a hostile confrontation with the first officer, whom the defendant spat at and called racial epithets. Then that officer left, and the second officer, who knew the defendant well, engaged him in conversation about unrelated matters and former acquaintances for a half hour, while also disparaging the murder victim as a suspect in a homicide and a person of "homosexual tendencies." (*Id*.

at p. 158.) The *Honeycutt* court found these coercive stratagems before advising defendant of his *Miranda* rights rendered the defendant's ensuing *Miranda* waiver and confession involuntary, explaining, "When the waiver results from a clever softening-up of a defendant through disparagement of the victim and ingratiating conversation, the subsequent decision to waive without a *Miranda* warning must be deemed to be involuntary for the same reason that an incriminating statement made under police interrogation without a *Miranda* warning is deemed to be involuntary." (*Honeycutt*, *supra*, at pp. 160-161.) According to the court, "Detective Williams had, prior to explaining the *Miranda* rights, already succeeded in persuading defendant to waive such rights." (*Id.* at p. 159.)

The facts before us are readily distinguishable from those in *Honeycutt*. First, there is no evidence that Detective Waters knew of, or had any relationship with, defendant. Second, the pre-waiver talk was recorded. Third, neither of the detectives talked about the victim or others present, disparaging them to encourage defendant to talk. Fourth, there was no discussion of any unrelated past events or former acquaintances in order to ingratiate defendant into talking. Fifth, defendant was no neophyte in police custody, having been arrested before, and his admissions indicated he knew he was a suspect in the shooting. Sixth, while Detective Waters referred to the *Miranda* warning as a "legal thing," he did not refer to it as a mere technicality, nor did he downplay defendant's rights.

This case is more analogous to *People v. Musselwhite* (1998) 17 Cal.4th 1216. In *Musselwhite*, the Supreme Court rejected the defendant's claim that his *Miranda* waiver

was invalid because investigators minimized the rights conferred by *Miranda*, thereby suggesting in the defendant's characterization that they were an "unimportant 'technicality.'" (*Musselwhite*, *supra*, at p. 1237.) The court agreed with "the proposition that evidence of police efforts to trivialize the rights accorded suspects by the *Miranda* decision—by 'playing down,' for example, or minimizing their legal significance—may under some circumstances suggest a species of prohibited trickery and weighs against a finding that the suspect's waiver was knowing, informed, and intelligent." (*Ibid*.) However, the court found no support for defendant's claim: "Given the brevity, as well as the accuracy, of Detective Bell's statement, the fact that the officers never described the *Miranda* warning as a 'technicality' or used similar words, the absence of similar comments during the course of the questioning, defendant's record of police encounters as evidenced by two prior felony convictions, the likelihood he was aware he was a suspect in a murder investigation . . . we conclude the record fails to support defendant's claim that the importance of his *Miranda* rights was misrepresented by the detectives and that he was thereby 'tricked' into waiving them." (*Id*. at p. 1238.)

For the above reasons, we reject defendant's claim that Detective Waters employed the *Honeycutt* softening-up technique to obtain a waiver of *Miranda* rights.

Likewise, we reject defendant's claim that his statements were involuntary and inadmissible because of the detective's alleged implied promises of leniency. In addition to pointing out Detective Waters's sole pre-waiver statement about "not filing a case" against defendant, defendant points out several post*Miranda* statements by the detective which defendant asserts support his claim of "express and clearly implied promises of

leniency." Specifically, defendant emphasizes the following: (1) the detective reiterated that he was "not filing any charges" against defendant; (2) the detective allegedly minimized the crime by implying that the situation just "[got] out of control" or "got to a boiling point," that the young girl who died was "more a victim of circumstance of a situation that got out of control," that it may not be murder because it "depends on the circumstances," and that "[t]his ain't a murder case"; (3) the detective suggested that telling the truth meant that the incident would become part of the past that would "go away over time"; and (4) the detective stated he could make recommendations to the district attorney depending on whether defendant talked.

A confession elicited by any promise of benefit or leniency, whether express or implied, is involuntary and therefore inadmissible. (*People v. Davis* (2009) 46 Cal.4th 539, 600.) However, merely advising a suspect that it would be better to tell the truth, when unaccompanied by either a threat of harm or a promise of benefits, does not render a confession involuntary. (*People v. Holloway* (2004) 33 Cal.4th 96, 115.) In determining whether defendant's confession was the product of a promise of leniency, we consider both Detective Waters' and defendant's postwaiver statements, along with defendant's familiarity with the criminal process.

Here, the detective urged defendant, on several occasions during the interrogation, to tell the truth about what happened. There were no promises of leniency in the detective's statements that (1) defendant was not under arrest; (2) the detective was not filing a case against defendant; (3) the detective had to talk to the district attorney; (4) the detective could make recommendations to the district attorney; or (5) the incident did not

rise to the level of murder. In fact, Detective Waters specifically told defendant that he could not and was not going to "make [him] any promises." The detective later added, "Am I sitting here telling you that if you cooperate with me, nothing's going to happen? I'm not telling you that." Defendant admitted, "I've been through the system, so I know how it is. [¶] . . . [¶] . . . I know how it works, man." Defendant acknowledged that he already had two strikes, adding, "I'd rather take two strikes any day over doing life in prison, but, at the same time, it's still, basically, the same thing." When defendant accused Detective Waters of coming to "pressure a person," the detective replied, "I'm not pressuring—no pressure." When defendant accused Detective Waters of looking for someone to admit to the shooting, the detective disagreed, saying, "No. No. I'm going to stop you right there." Defendant recognized that it was "up to the jury," not Detective Waters, as to who goes to jail. There is no indication that the detective expressly or impliedly promised leniency in order to manipulate defendant into a confession.

In the totality of the circumstances surrounding the interview, the evidence does not suggest defendant's *Miranda* waiver was anything but voluntary, knowing, informed, and intelligent. The trial court did not err in denying defendant's suppression motion.

B. The Trial Court Properly Instructed the Jury with CALCRIM No. 600.

Defendant contends that the court "should have instructed the jury as to the elements of attempted murder without the kill zone language. Failing that, if the court elected to instruct at all, the court had a sua sponte duty to instruct correctly." According to defendant, the "kill zone" portion of CALCRIM No. 600 is defective, because (1) it does not define the term "kill zone"; (2) it does not require the jury to find that each of

the victims was in the kill zone; (3) it misstates the specific intent to kill, a required element for an attempted murder conviction; (4) it does not explain that the kill zone theory does not apply if the defendant merely subjected everyone in the kill zone to harm and callously did not care if they lived or died; and (5) it is argumentative because it employs the inflammatory phrase "kill zone."[5]

1. Further Background Facts.

The prosecutor's theory for the attempted murder charges in count 3 (Y.), count 4 (M.1), count 5 (G.), and count 6 (J.) was that defendant sprayed bullets at the victim's car, creating a "kill zone" with the intention of killing everyone present.[6] The jury was instructed on attempted murder using the language of CALCRIM No. 600. As given in this case, the pertinent portion of that instruction states: "The defendant is charged in Counts Three, Four, Five and Six with attempted murder. [¶] To prove that the defendant is guilty of attempted murder, the People must prove that: [¶] 1. The defendant took at least one direct but ineffective step toward killing another person; [¶] AND [¶] 2. The defendant intended to kill that person. [¶] . . . [¶] A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a

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[5] The People contend defendant has forfeited any challenge to CALCRIM No. 600 because he failed to object or request any clarification or modification to the instruction. "'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.]" (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.) We consider these issues raised by defendant on the merits.

[6] The kill zone theory was adopted by the California Supreme Court in *People v. Bland* (2002) 28 Cal.4th 313 (*Bland*).) We will discuss the theory below.

particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of [Y., M.1, G.] and or [J.], the People must prove that the defendant intended to kill each one of them, or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill [Y., M.1, G.] and or [J.] or intended to kill everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of any one or all of those alleged victims."

2. Standard of Review.

"'An appellate court reviews the wording of a jury instruction de novo and assesses whether the instruction accurately states the law.' [Citation.] '"'[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.'"' [Citation.]" (*People v. Acosta* (2014) 226 Cal.App.4th 108, 119.) Jury instructions are flawed only if, after taking into account the instructions as a whole and the trial record, there is a reasonable likelihood the jury misconstrued or misapplied the words of the instruction. (*Ibid.*; *People v. King* (2010) 183 Cal.App.4th 1281, 1316.) "We presume that jurors are intelligent and capable of correctly understanding, correlating, applying, and following the court's instructions. [Citations.]" (*People v. Acosta*, *supra*, at p. 119.)

3. Analysis.

Initially, we note that CALCRIM No. 600 correctly states the law of attempted murder. (*People v. Lawrence* (2009) 177 Cal.App.4th 547, 557.) Defendant did not object to CALCRIM No. 600, and did not request any modification; however, he noted that the instruction needed "to be clarified" because there were "a lot of blanks to fill in."

During discussion of CALCRIM No. 600, defendant suggested wording to make the instruction read more naturally.[7]

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) Unlike the mental state for murder, which requires only a conscious disregard for life (implied malice), "'[a]ttempted murder requires the specific intent to kill.'" (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*).) While transferred intent does not apply to attempted murder, concurrent intent does, such that "a person who shoots at a group of people [may still] be punished for the actions towards everyone

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[7] "[DEFENSE COUNSEL]: . . . It seems like it should read in the second sentence of that bottom paragraph, 'In order to convict the defendant of the attempted murder of [M.1, G.],' all those names, 'the People must prove that the defendant,' and take out 'not only,' 'intended to kill those'—each individual 'or intended to kill everyone within the kill zone.' Because this is not a situation where you have a primary target, named primary target, and others.

"[PROSECUTOR]: I think they're all targets.

"THE COURT: Right. . . ."

The parties further added:

"THE COURT: . . . It goes on to say, 'If you have a reasonable doubt whether the defendant intended to kill'—any one of those individuals?

"[PROSECUTOR]: Uh-huh.

"[DEFENSE COUNSEL]: Yes.

"THE COURT: —'or intended to kill all of them in the kill zone, then you must find the defendant not guilty of attempted murder for any one of those alleged victims.' Right?

"[DEFENSE COUNSEL]: Yes.

"[PROSECUTOR]: I would agree with that."

Later, the parties agreed that the instruction should read, "'must prove that the defendant intended to kill each one of them or intended to kill everyone within the kill zone.'"

in the group even if that person primarily targeted only one of them." (*Bland, supra*, 28 Cal.4th at pp. 329, 331.) *Bland* concluded that a concurrent intent can be found when a "'kill zone'" is created, that is, when the defendant intends to kill a specific person and in order to do so employs a means that will cause the death of every person in the immediate vicinity of the target, the defendant may be liable for the attempted murder of every such person. (*Id*. at p. 329.) Examples include placing a bomb on an airplane or spraying a group of people with gunfire sufficient to cause the death of every person present. However, there must be evidence that the defendant specifically intended to kill every person in the zone. It is not sufficient that the defendant intended to kill one specific person and acted with conscious disregard for the likelihood of killing others. The jury can infer the defendant's intent to kill everyone around the target victim from the method the defendant used.[8] (*Id*. at pp. 329-331.)

Additionally, "a person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind. An indiscriminate would-be killer is just as culpable as one who targets a specific person." (*People v. Stone* (2009) 46 Cal.4th 131, 140.) Thus, defendants may be found guilty of multiple counts of attempted murder for spraying bullets at two occupied houses because they "harbored a specific intent to kill every living being within the residences they shot up." (*People v. Vang* (2001) 87 Cal.App.4th 554, 564.)

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[8] The scope of the kill zone theory as it has been interpreted by the intermediate Courts of Appeal is currently on review in *People v. Canizales*, S221958, review granted November 19, 2014.

Considering the issues raised by defendant, we begin with the assertion that the court "should have instructed the jury as to the elements of attempted murder without the kill zone language." While defendant acknowledges that it is within the court's discretion to instruct the jury on the kill zone theory, he offers no argument, substantive legal analysis, or citation of legal authority as to why it was an abuse of discretion to do so in this case. "Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion. [Citations.]" (*People v. Ham* (1970) 7 Cal.App.3d 768, 783, overruled on another ground in *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. 3.) Accordingly, we deem defendant's contention to be waived. In any event, we find no abuse of discretion in instructing the jury with the kill zone theory given the facts of this case.

Turning to defendant's specific attacks of the "kill zone" portion of CALCRIM No. 600, he initially contends that the instruction is defective because it does not define the term kill zone. Not so. CALCRIM No. 600 is consistent with our Supreme Court's description of the kill zone principle. "[T]he fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within . . . the 'kill zone.'" (*Bland, supra*, 28 Cal.4th at p. 329.) The kill zone theory "simply recognizes that a shooter may be convicted of multiple counts of attempted murder on a 'kill zone' theory where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the 'kill zone') as the means of accomplishing the killing of that victim." (*Smith, supra*, 37 Cal.4th at pp. 745-746.) The theory "is not a legal doctrine requiring special jury

instructions. . . . Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others." (*Bland*, *supra*, at p. 331, fn. 6; see *People v. Stone*, *supra*, 46 Cal.4th at p. 137.) Here, consistent with these principles, CALCRIM No. 600 informed the jury of the kill zone principle, and properly left to the jury the determination whether it could reasonably be inferred from the evidence that defendant intended to kill Y., M.1, G. and/or J. by killing everyone in the area of the victim's car.

Defendant claims the second defect in CALCRIM No. 600 is its failure to require the jury to find that each of the victims was in the kill zone. We conclude there is no reasonable possibility the jury misconstrued CALCRIM No. 600 so as to eliminate the requirement that it find that defendant had the specific intent to kill each of his victims. First, other jury instructions made clear that the jury was required to find that defendant intended to kill each person. (CALCRIM Nos. 520, 601.) Second, while the kill zone instruction states that proving defendant guilty of the attempted murder of everyone, i.e., nonintended targets, requires proof that he intended to kill not only Y., M.1, G. and/or J., but everyone within the kill zone, it adds: "If you have a reasonable doubt whether the defendant intended to kill [the intended targets or everyone] in the kill zone, then you must find the defendant not guilty of the attempted murder. . . ." This language is consistent with *Bland* and directed the jury that it could not find defendant guilty of attempted murder of the intended targets under a kill zone theory unless it found that he intended to kill everyone in the zone. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1243 (*Campos*).)

The third alleged defect in CALCRIM No. 600 is that it misstates the specific intent to kill, a required element for an attempted murder conviction. Despite defendant's claims to the contrary, the kill zone instruction did not misstate or eliminate the requirement of specific intent to kill the named victims. Rather, it gave the jury two options for finding intent to kill: Either defendant intended to kill the four named victims, or he intended to kill people in the group that included the named victims. (See *People v. Anzalone* (2006) 141 Cal.App.4th 380, 392-393.)

Next, defendant asserts that the instruction failed to explain that the kill zone theory does not apply if the defendant merely subjects everyone in the kill zone to harm and callously did not care if they lived or died. As stated above, CALCRIM No. 600 specifically told the jury that attempted murder requires an intent to kill and that, under the kill zone theory, defendant had to intend to kill the targeted victims and/or everyone in the kill zone. The instruction told the jury that it could not find defendant guilty of attempted murder of the intended targets under a kill zone theory unless it found that he intended to kill everyone in the zone.

Finally, defendant argues that the phrase "kill zone" is argumentative and inflammatory, unduly favoring the prosecution. As such, he asserts that the phrase compelled the jury to conclude that defendant had the requisite intent to kill. This same issue was raised and rejected in *Campos*. In that case, the court concluded, "CALCRIM No. 600 merely employs a term, 'kill zone,' which was coined by our Supreme Court in *Bland* and referred to in later California Supreme Court cases. [Citation.] It does not invite inferences favorable to either party and does not integrate facts of this case as an

argument to the jury. Other disparaging terms, including 'flight' (CALJIC No. 2.52), 'suppress[ion] of evidence' (CALJIC No. 2.06) and 'consciousness of guilt' (CALJIC No. 2.03) have been used in approved, longstanding CALJIC instructions. We see nothing argumentative in this instruction." (*Campos, supra*, 156 Cal.App.4th at p. 1244.) We agree with the *Campos* court's conclusion.

In sum, defendant forfeited his challenge to the adequacy of instructions on the kill zone principle, and in any event the instructions were correct.

Notwithstanding the above, even if the instruction was erroneous, the error was harmless in that it was not reasonably probable that if a correct instruction had been given a verdict more favorable to defendant would have resulted. (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1157 [misdirection of the jury, including incorrect, ambiguous, conflicting, or wrongly omitted instructions that do not amount to federal constitutional error are reviewed under the harmless error standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836.) The evidence of defendant's intent to kill the targeted victims and everyone was overwhelming under the "kill zone" theory or otherwise. His car approached the victim's car and stopped approximately 40 feet from it. Defendant emerged from the back passenger side seat with a gun. He pointed it in the direction of all of the girls and boys and started shooting. As he was shooting, he moved towards the group and the victim's car, spraying bullets at close range. Seven .40-caliber semiautomatic firearm cartridge cases found at the scene were consistent with the shooter aiming at the group of girls and boys both inside and outside the victim's car. On this evidence the jury would almost certainly have found intent by defendant to kill everyone

around the victim's car and inside it. Also, shooting at the group from close but not point-blank range, in a manner that could have inflicted a mortal wound, is sufficient to form an inference of intent to kill. (See *Smith*, *supra*, 37 Cal.4th at p. 743 ["evidence that defendant purposefully discharged a lethal firearm at the victims, both of whom were seated in the vehicle, one behind the other, with each directly in his line of fire, can support an inference that he acted with intent to kill both"].)

C. The Prosecutor's Error During Closing Argument Was Harmless.

Defendant contends the prosecutor committed prejudicial error during closing argument by misstating the legal standard to be applied in deciding whether provocation was legally sufficient to constitute heat of passion attempted voluntary manslaughter, and that the trial court erred in failing to sustain the defense objection to the prosecutor's misstatement of the law.

1. Further Background Facts.

While discussing jury instructions, defense counsel requested an instruction on the lesser included offense of heat of passion attempted voluntary manslaughter. The prosecutor noted that there was no evidence to support the instruction; however, she did not object because she did not want any conviction overturned for not giving the instruction. The trial court instructed the jury on attempted heat of passion voluntary manslaughter with CALCRIM No. 603.

During closing argument, the prosecutor stated: "So the next thing they may try to do is argue for a lesser offense. Let's argue for a voluntary manslaughter. There's two ways to get there. You can get there by heat of passion or imperfect self-defense. Okay?

[¶] So let me tell you what a heat of passion is. The defendant has to be provoked, and as a result of provocation, he acts rashly and under the influence of intense emotion that obscured his reasoning and judgment. The provocation—this is the important part—would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than judgment. [¶] What this is saying is, again, this a reasonable person standard. *A reasonable person under the same facts would have thought that they needed to kill or would have been so consumed by passion and so provoked that they would have killed*." (Italics added.)

Defense counsel objected on the basis of misstatement of the law and the trial court overruled the objection.

The prosecutor continued: "Let me give you an example of that. Say a husband walks in on his wife in bed with somebody else. I think we can all look at that situation and go, I probably would kill somebody. Or a guy walking in on somebody molesting his kid. You might kill somebody. That's—all of us, as average people, can understand that your passions would be so inflamed that somebody was probably going to be dead. Right? That's what heat of passion is."

During defense counsel's closing, he stated that there were two different theories of voluntary manslaughter, but that "I'm not going to talk about heat of passion. I'm only going to talk about imperfect self-defense. Please look at both instructions. This is very important." Defense counsel did, however, briefly argue that the comment "Fuck fags," was the provocation that was needed for attempted voluntary manslaughter.

Following closing arguments, and outside the presence of the jury, cocounsel for defense argued to the trial court that the prosecutor had misstated the law of heat of passion by arguing that the law was whether a reasonable person would be inflamed and provoked to the point of killing, instead of whether a reasonable person would be inflamed to act rashly. The prosecutor disagreed. The court stated, "Well, you're free to do that if you want to supplement your argument, though it doesn't appear to be part of your defense." Cocounsel for defense responded, "It is part of our defense. It just wasn't argued." The court replied, "It wasn't argued. Well, if you want to supplement the record with some cases, I'll be happy to read them."

2. Applicable Law.

We agree the prosecutor erred in misstating the law regarding the proper standard for assessing the legal sufficiency of provocation. In *People v. Beltran* (2013) 56 Cal.4th 935, the California Supreme Court explained that heat of passion is a state of mind that "precludes the formation of malice and reduces an unlawful killing from murder to manslaughter," and heat of passion is "caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation." (*Id*. at p. 942, fn. omitted.) Under the proper standard, "[p]rovocation is adequate only when it would render an ordinary person of average disposition 'liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.'" (*Id*. at p. 957.) The Supreme Court rejected the Attorney General's argument in that case that the proper standard for assessing the adequacy of provocation

is whether an ordinary person of average disposition would be moved to kill. (*Id*. at pp. 946, 949.)

Having concluded that the prosecutor erred, we next must determine whether reversal is warranted. A prosecutor's remarks can "'"so [infect] the trial with unfairness as to make the resulting conviction a denial of due process."'" (*People v. Frye* (1998) 18 Cal.4th 894, 969.) In such cases, the error amounts to federal constitutional error, and reversal is required unless we conclude it was harmless beyond a reasonable doubt. (*People v. Estrada* (1998) 63 Cal.App.4th 1090, 1096, 1106-1107, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) If the prosecutor's remarks did not rise to that level, we will not reverse unless we conclude it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the misconduct. (*People v. Crew* (2003) 31 Cal.4th 822, 839-840; *People v. Zurinaga* (2007) 148 Cal.App.4th 1248, 1260, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

3. Analysis.

Defendant claims the prosecutor's argument was no different from the argument deemed improper in *People v. Najera* (2006) 138 Cal.App.4th 212 (*Najera*) and constituted a "serious mis-statement of the law" requiring reversal of his conviction. In *Najera*, the defendant stabbed and killed the victim about five to 10 minutes after the victim called the defendant a "'jota' (translated as 'faggot')." (*Id*. at p. 216.) During closing argument, the prosecutor stated: "'Heat of passion is not measured by the standard of the accused. . . . As a jury, you have to apply a reasonable, ordinary person standard. . . . *Would a reasonable person do what the defendant did?* Would a

reasonable person be so aroused as to kill somebody? That's the standard.'" (*Id.* at p. 223, original italics.) "During rebuttal, the prosecutor stated: '*[T]he reasonable, prudent person standard . . . [is] based on conduct, what a reasonable person would do in a similar circumstance.* Pull out a knife and stab him? I hope that's not a reasonable person standard.'" (*Ibid*., original italics.) In *Najera*, the court explained that the italicized portions of the prosecutor's statements were incorrect: "An unlawful homicide is upon '"a sudden quarrel or heat of passion"' if the killer's reason was obscured by a '"provocation"' sufficient to cause an ordinary person of average disposition to act rashly and without deliberation. [Citation.] The focus is on the provocation—the surrounding circumstances—and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion." (*Ibid*.) The court noted that the prosecutor had "interspersed correct statements of the law with the incorrect ones," and concluded: "The trial court correctly instructed the jury to follow the court's instructions, not the attorneys' description of the law, to the extent there was a conflict. We presume the jury followed that instruction." (*Id*. at pp. 223-224.)

Here, as in *Najera*, the italicized portion of the prosecutor's argument is incorrect. But, also, as in *Najera*, the prosecutor interspersed correct statements of the law with the incorrect ones. There is no dispute that the trial court properly instructed the jury with CALCRIM No. 603. We presume the jury followed CALCRIM No. 603. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.)

Furthermore, as in *Najera*, the jury was instructed that to the extent the law as given by the trial court conflicted with the description of the law as given by the attorneys, the jury was to follow the court's instructions. (CALCRIM No. 200.)

Moreover, we conclude that defendant suffered no prejudice from the prosecutor's misstatement, because the evidence did not "'properly present[]' the issue of sudden quarrel or heat of passion. [Citation.] In other words, [defendant] suffered no prejudice because he was not entitled to an instruction on voluntary manslaughter in the first place." (*Najera, supra,* 138 Cal.App.4th at p. 225.) The only provocation in this case was the yelling of "Fuck fags," an insult to defendant, who was a Sex Cash gang member.[9] As in *Najera*, "[t]hat taunt would not drive any ordinary person to act rashly or without due deliberation and reflection. '"A provocation of slight and trifling character, such as words of reproach, however grievous they may be, or gestures, or an assault, or even a blow, is not recognized as sufficient to arouse, in a reasonable man, such passion as reduces an unlawful killing with a deadly weapon to manslaughter."' [Citation.]" (*Najera, supra,* at p. 226; see *People v. Manriquez* (2005) 37 Cal.4th 547, 586 [instruction on voluntary manslaughter based upon theory of a sudden quarrel or heat of passion not warranted when victim calls defendant a "'mother fucker'" and taunts him to take out his weapon and use it].) Yelling "Fuck fags" was insufficient to cause an

[9] Defendant asserts the provocative conduct also included things that happened at the party and immediately thereafter. However, defendant did not attend the party and offered no evidence of what, if anything, occurred at the party. Instead, the evidence shows that defendant shouted "Web" from inside the Impala when they drove by the party, and that the immediate response from Southside members was "Fuck fags."

ordinary person to lose reason and judgment under an objective standard. Because defendant was not entitled to a heat of passion attempted voluntary manslaughter instruction, the prosecutor's error did not cause him to suffer any prejudice.

D. CALCRIM No. 362 Relating to Consciousness of Guilt Was Proper.

Defendant contends that CALCRIM No. 362 (consciousness of guilt based on false statements) was improper because it "told the jury that a defendant's false or misleading statements 'relating to the charged crime . . . may show he was *aware of his guilt of the crime*.'" He argues that the instruction violated his rights to due process, a fair trial, and equal protection. We disagree.

1. Further Background Facts.

The prosecutor requested CALCRIM No. 362 based on defendant's misleading statements regarding his alibi. Defendant raised no objection. The trial court instructed the jury with CALCRIM No. 362: "If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

2. Analysis.

Defendant's arguments on appeal are unavailing because the California Supreme Court has held that CALCRIM No. 362 is a correct statement of the law and does not run afoul of constitutional strictures. (*People v. Howard* (2008) 42 Cal.4th 1000, 1025 ["We

have repeatedly rejected arguments attacking [CALCRIM No. 362]]," citing *People v. Nakahara* (2003) 30 Cal.4th 705, 713 [rejecting challenges to CALJIC No. 2.03,[10] a "consciousness of guilt" instruction that was predecessor of and basically identical to CALCRIM No. 362].) The instruction does not invite the jury to draw irrational and impermissible inferences of guilt when there is a basis for the jury to make an inference that a defendant made a self-serving statement to protect himself. (*People v. Moore* (2011) 51 Cal.4th 386, 414, relying on *People v. Howard*, *supra*, at pp. 1021, 1025.) Nor does it direct the jury to make the falsity of defendant's statement the determinative factor in their deliberations because it explicitly instructs that "'evidence that the defendant made [a false or misleading] statement cannot prove guilt by itself.'" Moreover, CALCRIM No. 362 is not an improper pinpoint instruction. (*People v. McGowan*, *supra*, 160 Cal.App.4th at p. 1104 ["CALCRIM No. 362 is not an unlawful 'pinpoint' instruction"]; see also *People v. Alexander* (2010) 49 Cal.4th 846, 922 [noting court's consistent rejection of contention that standard consciousness-of-guilt instructions were improperly argumentative in "'pinpoint[ing]' the prosecution's argument regarding how the jury should view certain evidence"].)

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[10] CALCRIM No. 362 is the successor to CALJIC No. 2.03, and the two instructions are substantively identical. (See *People v. McGowan* (2008) 160 Cal.App.4th 1099, 1104 ["Although there are minor differences between CALJIC No. 2.03 and CALCRIM No. 362 . . . none is sufficient to undermine our Supreme Court's approval of the language of these instructions."].) Former CALJIC No. 2.03 provided as follows: "If you find that before this trial [the] defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which [he] is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

Defendant's claim that CALCRIM No. 362 is unconstitutional because it employs the phrase "aware of his guilt of the crime" instead of "consciousness of guilt" is foreclosed by *People v. Hernández Ríos* (2007) 151 Cal.App.4th 1154, which found no constitutional infirmity on account of the term "aware of his guilt" in CALCRIM No. 372, a related "flight" instruction. Under *Hernández Rios*, the use of the term "aware of his guilt" in the CALCRIM instructions on false statements, flight, and fabrication of evidence, respectively, is entirely consistent with the use of the term "consciousness of guilt" in the predecessor line of CALJIC instructions on the same topics. (*Hernández Rios*, *supra*, at pp. 1158-1159.)

CALCRIM No. 362 was properly read to the jury, did not create an impermissive inference, or lessen the prosecutor's burden of proof.

E. The Cumulative Error Doctrine Does Not Apply.

Defendant contends the cumulative impact of the foregoing alleged errors violated his right to a fair trial. We have found only one error, related to the prosecutor's misstatement of the law during closing argument, and have concluded that the error was harmless. Because there is only one harmless error, there is nothing to cumulate, and therefore we find defendant's cumulative error argument to be unpersuasive. (See *People v. Duff* (2014) 58 Cal.4th 527, 562 ["nothing to cumulate"].)

F. The Abstract of Judgment Must Be Modified.

Defendant contends, and the People concede, that the abstract of judgment incorrectly indicates that the trial court imposed a $10,000 parole revocation fine under section 1202.45. The trial court never imposed a parole revocation fine because

defendant is not eligible for parole. We agree with the parties and order the abstract of judgment amended to reflect the trial court's actual order.

III. DISPOSITION

The superior court clerk is directed to modify the abstract of judgment by deleting the $10,000 parole revocation fine (§ 1202.45), and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

MCKINSTER
J.

FIELDS
J.